

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
MCALLEN DIVISION

PLAINSCAPITAL BANK,

§

Plaintiff,

§

v.

§

CIVIL ACTION NO. 7:19-cv-157

3 DIAMONDS, INC., EL TORO BUILDERS,  
INC., SALTILLO GROUP, L.L.C., S & F  
DEVELOPERS & BUILDERS, LLC, AND  
NORBERTO SALINAS,

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Defendants.

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**COMPLAINT OF PLAINSCAPITAL BANK TO  
CONFIRM ARBITRATION AWARD AND FOR ENTRY OF JUDGMENT**

Plaintiff, PlainsCapital Bank ("PlainsCapital" or the "Bank"), pursuant to the Federal Arbitration Act ("FAA"), 9 U.S.C. § 9, files its Complaint to Confirm Arbitration Award and for Entry of Judgment (the "Complaint") and respectfully requests that this Court confirm and enter judgment on Final Award issued by the American Arbitration Association ("AAA") on April 15, 2019, and in support would show the following:

**Parties**

1. PlainsCapital is a Banking Association doing business in Texas.
2. 3 Diamonds, Inc. ("3 Diamonds") is a Texas corporation with its principal place of business in Mission, Texas. 3 Diamonds may be served by and through its President, Norberto Salinas, at 500 E. 9<sup>th</sup> Street, Mission, Texas 78572.

3. El Toro Builders, Inc. ("El Toro") is a Texas corporation with its principal place of business in Mission, Texas. El Toro may be served by and through its President, Norberto Salinas, at 500 E. 9<sup>th</sup> Street, Mission, Texas 78572.

4. Saltillo Group, L.L.C. ("Saltillo") is a Texas limited liability company with its principal place of business in Mission, Texas. Saltillo may be served by and through its President, Norberto Salinas, at 500 E. 9<sup>th</sup> Street, Mission, Texas 78572.

5. S & F Developers & Builders, LLC ("S&F") is a Texas limited liability company with its principal place of business in Mission, Texas. S&F may be served by and through its President, Norberto Salinas, at 500 E. 9<sup>th</sup> Street, Mission, Texas 78572.

6. Norberto Salinas is an individual residing in Mission Texas and may be served at 500 E. 9<sup>th</sup> Street, Mission, Texas 78572.

#### Jurisdiction and Venue

7. The Court has subject matter jurisdiction of this action under 28 U.S. Code § 1331 and 9 U.S.C. § 9, as: (1) the Arbitration Provisions, as defined in Paragraph 12, below, provided that the loan transactions at issue in the Arbitration evidenced transactions in interstate commerce and (2) no court was specified in the Arbitration Provisions between the parties.

8. Venue in this district is proper as the Arbitration Award was made in this district. 9 U.S.C. §§ 9-11. Additionally, venue in this district is proper as a substantial part of the events or omissions giving rise to the underlying claims occurred here. 28 U.S.C. § 1391(b)(2). Venue is also appropriate pursuant to 28 U.S.C. § 1391(b)(1) as Defendants

reside in and are doing business in this district and the causes of action alleged arose in this district.

9. This is an action brought pursuant to Section 9 of the FAA, 9 U.S.C. § 9 to confirm an arbitration award. The arbitration proceedings were conducted before the AAA by a three-person panel (collectively referred to as the "Panel" or the Arbitrators").

### **Background and Claim**

10. The fifteen notes at issue (the "Notes") were originally made and owned by First National Bank, Edinburg Texas ("FNB"). On September 13, 2013: (1) the Federal Deposit Insurance Corporation (the "FDIC") was appointed as Receiver of all assets of FNB; and (2) the FDIC, as Receiver, transferred certain assets of FNB, including the Notes, to PlainsCapital.

11. The dispute arose when Defendants failed to make payments on the Notes and under accompanying guaranty agreements (the "Guaranty Agreements"). PlainsCapital gave notice of default to and made demand for payment upon Defendants; however, Defendants failed to pay sums due.

12. The Defendants signed various agreements in workout attempts with PlainsCapital related to the defaults which contained arbitration provisions which provided, in pertinent part:

THE PARTIES ACKNOWLEDGE THAT THIS AGREEMENT EVIDENCES A TRANSACTION INVOLVING INTERSTATE COMMERCE IN THAT THE FUNDS WHICH MAY BE ADVANCED OR COMMITTED UNDER THIS AGREEMENT ARE DERIVED FROM INTERSTATE AND/OR INTERNATIONAL FINANCIAL MARKETS, THE FEDERAL ARBITRATION ACT SHALL GOVERN THE INTERPRETATION, ENFORCEMENT, AND PROCEEDINGS PURSUANT TO THE ARBITRATION CLAUSE OF THIS AGREEMENT

(the "Arbitration Provisions").

13. On or about January 10, 2018 PlainsCapital filed its Demand for Arbitration (the "Demand") with the AAA against 3 Diamonds, El Toro, Saltillo, and S&F (collectively, the "Corporate Defendants") and Norberto Salinas ("Salinas" and with the Corporate Defendants, collectively, the "Defendants") (1) to collect amounts outstanding on Notes, (2) to collect amounts owing on the Notes from Salinas under the terms of his Guaranty Agreements, (3) for attorneys' fees and expenses incurred by the Bank to collect amounts due under the Notes and Guaranty Agreements and in the Arbitration, (4) for AAA filing and administrative fees, and (5) for the arbitrators' fees and expenses.

14. Defendants asserted numerous defenses against PlainsCapital's claims, including, that the loans at issue or some of them, were for the purchase of FNB stock and as such were illegal and void based on violations of 12 U.S.C. §83. Defendants also asserted fraud by FNB which they alleged was imputed to PlainsCapital and not barred as to PlainsCapital under *D'Oench Duhme & Co. v. FDIC*, 315 U.S. 447 (1042) and its current statutory companion found at 18 U.S.C. §1823(e)(2006).

15. On May 21, 2018, Catherine Stone (Chair), Lisa Powell and Tom Collins (collectively, the "Arbitrators" or the "Panel") were confirmed by the AAA as arbitrators for the Arbitration.

16. Trial of the Arbitration was conducted in McAllen, Texas on February 11 and February 12, 2019.

17. On April 15, 2019, the Arbitrators signed the Final Award, a true and correct copy of which is attached hereto as Exhibit "1" and incorporated herein for all purposes. In the Final Award, the Panel awarded PlainsCapital the following:

- a. From and against 3 Diamonds and Salinas, jointly and severally, under 3 Diamonds Note No. 1, the amount of \$22,853.84;
- b. From and against 3 Diamonds and Salinas, jointly and severally, under 3 Diamonds Note No. 2, the amount of \$46,986.78;
- c. From and against 3 Diamonds and Salinas, jointly and severally, under 3 Diamonds Note No. 3, the amount of \$438,819.04;
- d. From and against 3 Diamonds and Salinas, jointly and severally, under 3 Diamonds Note No. 4, the amount of \$319,814.50;
- e. From and against 3 Diamonds and Salinas, jointly and severally, under 3 Diamonds Note No. 5, the amount of \$25,334.66;
- f. From and against 3 Diamonds and Salinas, jointly and severally, under 3 Diamonds Note No. 6, the amount of \$25,151.85;
- g. From and against 3 Diamonds and Salinas, jointly and severally, under 3 Diamonds Note No. 7, the amount of \$32,903.53;
- h. From and against El Toro and Salinas, jointly and severally, under El Toro Note No. 1, the amount of \$22,995.53;
- i. From and against El Toro and Salinas, jointly and severally, under El Toro Note No. 2, the amount of \$300,527.77;
- j. From and against El Toro and Salinas, jointly and severally, under El Toro Note No. 3, the amount of \$1,367,028.25;
- k. From and against Saltillo Group and Salinas, jointly and severally, under Saltillo Note No. 1, the amount of \$81,355.76;
- l. From and against Saltillo Group and Salinas, jointly and severally, under Saltillo Note No. 2, the amount of \$28,707.87;
- m. From and against Saltillo Group and Salinas, jointly and severally, under Saltillo Note No. 3 in the amount of \$485,808.62;

- n. From and against S & F and Salinas, jointly and severally, under the S & F Note, the amount of \$519,725.52;
- o. From and against Salinas under the Salinas Note, the amount of \$235,656.60;
- p. From and against Defendants, post-judgment interest on the foregoing sums at the contractual default rate of 17.75% per annum;
- q. From and against Defendants, jointly and severally, PlainsCapital's attorneys' fees and expenses incurred in the collection of the Notes and Guaranty Agreements and for prosecution of an award in this Arbitration in the amount of \$125,000.00;
- s. From and against Defendants, jointly and severally, post-judgment interest on the award to PlainsCapital for its costs, attorneys' fees, expenses and arbitration fees at 5% per annum, the highest lawful rate.
- t. From and against Defendants, jointly and severally, administrative fees and expenses of the American Arbitration Association totaling \$14,700.00 and the compensation and expenses of the Arbitrators totaling \$45,438.98 for a total in the amount of \$60,138.98

18. The Final Award was in full and final settlement of all liability and damages, claims and defenses submitted in the Arbitration and all claims and pending motions not expressly granted therein were denied. The Final Award was final and confirmable.

19. Defendants have paid no portion of the Final Award.

20. The Arbitration Provisions in documents signed by Defendants and PlainsCapital also provided, in pertinent part:

**THE AWARD OF THE ARBITRATORS, OR A MAJORITY OF THEM, SHALL BE FINAL, AND JUDGMENT UPON THE AWARD RENDERED MAY BE ENTERED IN ANY COURT, STATE OR FEDERAL, HAVING JURISDICTION, ERRORS OF LAW SHALL BE AN ADDITIONAL GROUND FOR VACATUR OF AN AWARD RENDERED PURSUANT TO THIS PROVISION.** [emphasis added]

21. Section 9 of the Federal Arbitration Act provides, in pertinent part,

"If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made.

22. PlainsCapital now seeks an order from the Court confirming the Final Award and awarding it judgment in accordance with such Final Award.

WHEREFORE, PlainsCapital Bank requests that this Court confirm the Final Award attached as Exhibit "1," render judgment in accordance with the terms of the Final Award with all relief granted therein to PlainsCapital, and for such other and further relief to which it may be entitled.

Respectfully submitted,

By: /s/ Diann M. Bartek  
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ATTORNEYS FOR PLAINTIFF  
PLAINSCAPITAL BANK

AMERICAN ARBITRATION ASSOCIATION  
Commercial Arbitration Tribunal

PLAINSCAPITAL BANK, <i>Claimant</i>	§	
v.	§	AAA CASE NO. 01-18-0000-1131
3 DIAMONDS, INC., EL TORO BUILDERS, INC., SALTILLO GROUP, L.L.C., S&F DEVELOPERS & BUILDERS, LLC, and NORBERTO SALINAS, <i>Respondents</i>	§	

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FINAL AWARD

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The undersigned Arbitrators, having been designated in accordance with the written agreements entered into by the above-named parties and in accordance with the written *Commercial Arbitration Rules* of the American Arbitration Association, and having been duly sworn and having heard the proofs and considered the allegations of the parties, and based on the facts and the law, as more fully explained herein, issue this FINAL AWARD in this matter.

*Preliminary Statement*

Claimant, PlainsCapital Bank, initiated this arbitration proceeding against Respondents, 3 Diamonds, Inc.; El Toro Builders, Inc.; Saltillo Group, L.L.C.; S & F Developers & Builders, LLC; and Norberto Salinas, to collect on fifteen promissory notes that the Bank alleged were in default and to enforce fourteen guaranty agreements executed by Salinas. Pursuant to the parties'

contractual agreements, the matter was submitted to a panel of three arbitrators duly selected in accordance with the agreements' provisions.

A hearing was conducted before the arbitrators in McAllen, Texas on February 11 and 12, 2019. The Bank was represented by Diann M. Bartek and Jeana Long, Dykema Gossett PLLC, and Respondents were represented by Reynaldo Ortiz, Law Offices of Reynaldo Ortiz, L.P. and Mark A. Weitz, Weitz Morgan, PLLC. Testimony was heard from witnesses Gregory Harris, Michael Cacanougher, and Iliana Castillo-Garza. Documentary evidence was received from both parties. At the conclusion of the hearing on November 12, 2019, counsel affirmed that they were provided with sufficient time to present their claims and defenses. Written post-hearing closing arguments were filed by both parties, as were proposed final awards. By agreement, the Bank's counsel filed a post-hearing attorneys' fee affidavit. The hearing was declared closed on March 14, 2109. In rendering this Final Award the panel has considered all submitted testimony, exhibits, and briefing.

**Factual Background**

1. The Bank is the successor in interest to First National Bank, Edinburg on fifteen promissory notes executed by Salinas, one individually and the other fourteen as an officer of the entity-borrower Respondents. Salinas executed Guaranty Agreements on the fourteen notes involving the entity-borrower Respondents. The parties are fully aware of the promissory notes and guaranty agreements at issue, but for ease of discussion the notes and principal amounts are briefly described below:

Loan No. **140005714** (3-Diamonds No.1-\$250,000.00) April 20, 2006  
(*BANK Ex. 1*)

Loan No. **1146020384** (3 Diamonds No.2-\$130,000.00) October 27, 2010 (*BANK Ex. 5*)

Loan No. **1016020570** (3 Diamonds No.3-\$1,400,000.00) April 21, 2011  
(*BANK Ex. 9*)

Loan No. **1146022077** (3 Diamonds No.4-\$305,000.00) March 1, 2012  
(*BANK Ex. 14*)

Loan No. **1146022409** (3 Diamonds No.5-\$45,000.00) May 1, 2012  
(*BANK Ex. 18*)

Loan No. **1016024975** (3 Diamonds No.6-\$42,617.10) March 15, 2003  
(*BANK Ex. 22*)

Loan No. **1016024983** (3 Diamonds No.7-\$51,600.00) March 18, 2013  
(*BANK Ex. 26*)

Loan No. **315352** (El Toro No.1-\$62,000.00) March 8, 2004 (*BANK Ex. 30*)

Loan No. **140005338** (El Toro No.2-\$525,000.00) May 16, 2006 (*BANK Ex. 34*)

Loan No. **1146017944** (El Toro No.3-\$1,300,000.00) December 23, 2009  
(*BANK Ex. 38*)

Loan No. **140005582** (Saltillo No.1-\$2,250,000.00) March 24, 2006  
(*BANK Ex. 42*)

Loan No. **1146019599** (Saltillo No.2-\$50,000.00) June 5, 2010 (*BANK Ex. 46*)

Loan No. **1146020155** (Saltillo No.3-\$250,000.00) December 10, 2010  
(*BANK Ex. 50*)

Loan No. **1146018878** (S&F-\$817,200.00) June 16, 2010 (*BANK Ex. 54*)

Loan No. **1146016778** (Salinas-\$1,000,000.00) July 23, 2009 (*BANK Ex. 58*)

**Claims and Defenses Presented**

2. The Bank claims that each of the fifteen promissory notes is in default and seeks an award declaring the notes in default and awarding the Bank monetary recovery on the notes, along with interest and attorneys' fees. Because Salinas guaranteed the fourteen entity notes, the Bank seeks recovery against Salinas for breach of the guaranty agreements as to those notes.

3. Respondents alleged numerous affirmative defenses in their original answer, but proceeded to hearing on fewer defenses, mainly contending: (1) this panel is without jurisdiction to grant the Bank relief; (2) the Salinas note is a void stock note; (3) the Bank released four notes in a Release of Lien document; (4) the Bank's predecessor in interest, First National Bank of Edinburg, committed fraud that precludes recovery on the notes; (5) the Bank committed fraud in obtaining Salinas' execution of Discount Payoff Agreements covering eleven notes; and (6) payment in full on the notes.

**Jurisdiction of the Arbitration Panel**

4. We first address the threshold issue of the panel's jurisdiction. During the course of trying to work out payment of the notes at issue, the Bank prepared, and Salinas executed, four Agreements for Discounted Payoff. Section 5.14(d) of these four Agreements provides in part that all arbitration hearings "shall commence within ninety (90) days of the demand for arbitration."<sup>1</sup> Because the arbitration hearing was not commenced within ninety days of the demand for arbitration,

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<sup>1</sup> There are numerous differing arbitration provisions in the loan documents which do not contain the 90-day limitation. For the reasons set forth below, we need not decide if the arbitration provision in the Discounted Payoff Agreement supersedes the others.

Respondents contend the panel is without jurisdiction to proceed. We reject this claim.

5. We need not decide whether section 5.14(d) is jurisdictional or merely procedural. Section 5.4 of the Agreements provides they can be modified in writing, and in this case they were. On June 4, 2018, a telephonic preliminary scheduling conference was held in which counsel for the Bank and counsel for Respondents (Mr. Weitz and Ms. Martinez of the Ortiz Law Firm) participated. Counsel for both parties agreed in writing via email correspondence to the date and time of the telephonic conference. During the telephonic conference counsel for both parties verbally agreed to schedule the arbitration hearing for February 11-14, 2109. That verbal agreement was memorialized in the Agreed Scheduling Order dated June 15, 2018 and signed by counsel for both parties, including both Mr. Weitz and Mr. Ortiz. Accordingly, any requirement to conduct the arbitration hearing within ninety days of the arbitration demand was modified in writing. The hearing was conducted within the time period agreed to by the parties. Respondents' jurisdictional challenge is denied.

6. Additionally, even assuming that the 90-day provision is substantive and not modified, Section 5.14(c) of the Agreement for Discounted Payoff provides that the arbitration shall be governed by the current version of the applicable AAA Commercial Arbitration Rules. AAA Commercial Arbitration Rule R-7(c) requires a respondent to raise any objection to jurisdiction no later than the filing of the answering statement to the claim giving rise to the objection. The Bank made its demand for arbitration on January 5, 2018, and Respondents filed their answer on

July 2, 2018. The first time that Respondents raised a jurisdictional objection is in their Pretrial Statement filed on February 1, 2019. Respondents also waived any challenge to jurisdiction.

**Reasoning and Decision**

*Collection on Notes and Breach of Guaranty Agreements*

7. In order to collect on the notes the Bank had to establish as to each note that (1) the note exists, (2) Respondent(s) signed the note, (3) the Bank is the current holder or owner of the note, and (4) a specific balance is due and owing on the note.

*See Trueheart v. Sanghavi*, 875 S.W.2d 412, 415 (Tex. App.–Corpus Christi 1994, no writ). In seeking to enforce the Guaranty Agreements, the Bank was required to prove: “(1) the existence and ownership of the guaranty agreement; (2) the terms of the underlying contract by the holder; (3) the occurrence of the conditions upon which liability is based; and (4) the failure or refusal to perform the promise by the guarantor.” *Duarte-Viera v. Fannie Mae*, 560 S.W.3d 258, (Tex. App.–Amarillo 2016, no pet.) (internal citations omitted). The third element requires proof of the debtors’ default on the underlying note, thus activating the guarantor’s liability under the guarantees. *Kaminetzky v. Park Nat'l Bank of Houston*, No. 01–96–01002–CV, 2001 WL 832350, at \*4 (Tex.App.–Houston [1st Dist.] July 19, 2001, pet. denied) (mem. op., not designated for publication).

8. There is no dispute that the fifteen notes and fourteen guaranty agreements exist and were executed by the proper parties. Although Respondents initially challenged whether the Bank is the owner or holder of the notes, that dispute was resolved at the hearing when the Bank produced the originals of fourteen notes and

the original renewal of the fifteenth note. The majority of the remaining issues regard Respondents' defenses that relate to payment or release of liability for further payment.

*Stock Loan and OREO Loan Defenses*

9. Respondent Salinas contends the Salinas Note (*Bank Ex. 58*) in the original principal amount of \$1,000,000.00 is a prohibited stock loan and that recovery of any outstanding balance is thus precluded. Castillo-Garza testified that she believed the note was an unsecured loan used to purchase First National Bank stock when originally issued by First National Bank. A review of the record indicates, however, that the Salinas Note was secured by 400 acres of real property and is not a stock loan.<sup>2</sup> Similarly, the evidence conclusively establishes that none of the proceeds of the fifteen notes was for the purchase of First National Bank's other owned real estate (OREO loans). There also was no testimony from Salinas or an expert witness that the alleged purchase price of any of OREO property was for more than market value. These defenses are without evidentiary support and are denied.

*Release of Liability on Four Notes*

10. Respondents contend in post-hearing briefing that payment of four notes was released by the Bank in Release of Lien documents. (*Respondents' Ex. 9*). The language in question is as follows:

Holder of the Note and Lien **acknowledges payment and satisfaction in full of all obligations** secured by the Deed of Trust Security Agreement Financing Statement and hereby release[s] the

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<sup>2</sup> After it was pointed out that it was a secured loan, Castillo-Garza testified that it renewed a prior unsecured loan. However, it was not demonstrated that she has personal knowledge of any such original loan, and there is no reference in the note to renewal of a prior note.

Property from all liens held by the Holder of Note and Lien without regard to how such liens were created or evidenced.

Holder of Note and Lien expressly waives and releases all present and future rights to establish or enforce the Lien as security for payment for any obligations under the Note.

Respondents' contention that the bolded language released liability for payment of the deficiencies on the notes is without support. The release language, when read in context of the full sentence and document, provides for release of liens on property securing the notes at issue. If the notes in question had been paid and extinguished, the second paragraph would have been superfluous. There is no evidence that this language, when reasonably construed, was intended to or did in any way, release the deficiency balances. Further, the Respondents presented no evidence corroborating their position that the parties considered the notes paid after the Release of Lien documents were executed, for instance the Bank's return of the notes to Respondents with the notation "paid and extinguished". Accordingly, we deny Respondents' defense of release on the four notes.

*Fraud of First National Bank-Edinburg*

11. Respondents' pleadings and briefings do not detail the fraud allegedly committed by First National Bank in connection with the transactions in question. Likewise, no testimony was presented at the hearing regarding any fraud by First National Bank relative to the notes and guaranties at issue. Thus, there is no credible evidence of any fraud on the part of First National Bank as relates to the matters before this panel. Even if there were evidence of fraud as relates to the issues in this arbitration, Respondents further have failed to establish how such fraud could be imputed to the Claimant Bank and not barred by the common law

doctrine set forth in *D'Oench Duhme & Co. v. FDIC*, 315 U.S. 447 (1942) and its current statutory companion found at 18 U.S.C. §1823(e)(2006).

Moreover, each of the notes is the subject of a forbearance agreement and/or an agreement for discounted payoff executed after the FDIC closed First National Bank of Edinburgh.<sup>3</sup> The forbearance agreements and the agreements for discounted payoff contain almost identical, if not in fact identical, language in which Respondents represent that they have no defenses to enforcement of the notes and that they release the Bank and its predecessors from all claims as of the date of those agreements. As a result, any defenses of Respondents to the enforcement of the notes based upon the conduct of First National Bank of Edinburgh have been waived and released.

#### *Fraud of the Bank*

12. Respondents allege the Bank committed fraud in obtaining Salinas' execution of four discount payoff agreements that apply to at least twelve of the fifteen notes. These agreements were drafted by the Bank and thus are construed against the Bank. *Temple-Eastex, Inc. v. Addison Bank*, 672 S.W.2d 793 (Tex. 1984). Gregory Harris, Senior Vice President for Commercial Loans, testified that the agreements were presented to Salinas as part of the Bank's on-going workout efforts with Salinas to obtain payment on the notes. Salinas signed the payoff agreements during a brief meeting with Harris at the Bank. Based on their interactions, Harris concluded that Salinas, an astute businessman with decades of experience as a real estate developer, understood that the agreements did not eliminate the entire

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<sup>3</sup> Many of the modifications of the notes also include broad release language.  
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amount due on the notes. Salinas' executive assistant, Castillo-Garza, testified that Salinas met with Harris for no more than twenty minutes, an insufficient time for him to read and understand the agreements. She also testified that both she and Salinas believed the partial payments made by Salinas in accordance with the agreements were intended and accepted as payment in full on the notes. Salinas did not testify by deposition or at the hearing.

13. The title of the agreements, "Agreement for Discounted Payoff" (*Bank Exs. 65-68*) could lead one to believe the agreements were for a final payoff of the relevant loans. Castillo-Garza's testimony was to that effect. However, the title of a document is not conclusive; it is the substance of a document that governs. *Enterprise Leasing Co. of Houston v. Barrios*, 156 S.W.3d 547, 549 (Tex. 2004). Three of the agreements contain language clearly indicating that the "discounted payoff amount" was in "partial satisfaction" of the outstanding deficiencies on the notes. (See, e.g., *Bank Ex. 65*): "[Respondents] have offered and agreed to pay Lender and Lender has agreed to accept a discounted payoff amount ... to be applied to the amount outstanding...at the Lender's sole discretion...in partial satisfaction of the amount outstanding on the Notes...[Respondents] understand, acknowledge and agree that after application of the Payoff Amount to the Notes, outstanding amounts will remain unpaid under such notes...and this Agreement in no way limits, impairs or affects in any manner [Respondents'] liability under the Loan Documents for payment in full of the Deficiency Balance." Both the offer and acceptance of payoff amounts were in "partial satisfaction" of the amount outstanding on the notes. *Id.* Similar references to "partial satisfaction of the

amount outstanding on the Notes" are found in two other agreements. (*Bank Exs. 66, 68*). The discounted payoff agreements in Bank Exhibits 65, 66, and 68 were for the specific purpose of the Bank releasing collateral securing the notes. The agreement governing the El Toro notes was worded differently, but clearly recognizes on-going liability for those notes after certain discounted payments, and in fact provides that the outstanding deficiency of the El Toro No.1 note was to be paid within 90 days of execution of the agreement. (*Bank Ex. 68*). Castillo-Garza testified that Salinas paid more than \$3,000,000.00 under these agreements and had no reason to do so unless it was to extinguish his debt. However, the testimony of Castillo-Garza is not persuasive. Respondents owed \$8,000,000 to the Bank, so they did in fact have a very good reason to pay the Bank \$3,000,000 to reduce the amount owed and to decrease the amount of interest accruing. Further, Respondents did not provide any explanation as to why the Bank would agree to accept less than 50% of the amount owed. Castillo-Garza also testified that Respondents sold property at a discount to make the payments required under the discounted payoff agreements, because they thought that the notes would thereby be paid in full. However, Respondents presented no competent evidence that any property was in fact sold for less than market value. The total amount borrowed under the promissory notes was in excess of \$8,000,000.00, so payment of \$3,000,000.00 does not compel a finding that the discounted payoff agreements were intended to extinguish the full amount of Respondents' debt.

14. All four of the discounted payoff agreements contain language in which Respondents acknowledge the Loan Documents are "duly authorized ... remain in

full force and effect ... are valid, binding and enforceable [against Respondents]" and that "all indebtedness under the Loan Documents is ... unconditionally due and owing in full to the Lender without any defense or offset whatsoever, and the [Respondents] have no defenses, claims, counterclaims, or other rights that could be asserted to impair, delay, or adversely affect Lender's receipt of full payment....". (*Bank Exs. 65-68*). Similar language is found in forbearance agreements executed by Respondents. (*Bank Exs. 61-64*). Based on the record and the language of the documents, we conclude that the Respondents have not established fraud on the part of the Bank.

*Default on the Notes and Payment Defense*

15. The Bank provided documentary evidence and testimony through Michael Caranougher, Senior Vice President of Special Assets, of the defaults on each of the notes and the outstanding balances due on each of the notes. At the request of the panel, the Bank provided post-hearing briefing in which it calculated the per diem amount of interest due on the deficiency amounts of the notes through April 15, 2019. The Bank stated at the hearing that it was claiming interest at the contractual default rate of 17.75%, although we note that some of the notes provide for default rate interest at the highest legal rate, which is currently 18%. Respondents have not challenged the calculations of interest on the amounts due. Respondents challenge the amounts due pursuant to the defenses discussed above and which the panel have denied. Accordingly, the panel concludes that the payment defense advanced by Respondents is without support in the record.

*Waiver of Defenses*

16. Although we have discussed the merits of Respondents' defenses, we note that the forbearance agreements and the discounted payoff agreements specifically waive and preclude the defenses raised by Respondents. Therefore, the panel concludes that all defenses raised by Respondents are without merit and hereby are denied.

*Attorneys' Fees*

17. The promissory notes and the guaranty agreements provide for the recovery of costs and reasonable and necessary attorney's fees. At the direction of the Arbitrators and by agreement of the parties, the Bank's counsel provided a post-hearing Attorneys' Fee Affidavit executed by Diann Bartek, lead counsel for the Bank. The Bank requests recovery of attorneys' fees and expenses in the amount of \$176,000.00.

18. An award of reasonable attorneys' fees and expenses is within the discretion of the Arbitrators. The affidavit of counsel addresses her extensive experience and qualifications and the familiar *Arthur Anderson* factors. The affidavit also states the fee rate for each of the billers (two attorneys and one paralegal); however, there is no breakdown of how many hours were spent by each of the three billers. Rather, the affidavit simply states the total number of hours the firm's professionals collectively devoted to this matter. Accordingly, the Arbitrators exercise their discretion and find that \$125,000.00 is an appropriate amount of reasonable and necessary attorneys' fees in this matter.

*Final Award on Notes and Fees*

19. Based on the foregoing, the Panel awards the following:

Claimant, PlainsCapital Bank, recover an Award (calculated as of April 15, 2019) of and from the Respondents as follows:

- a. From and against 3 Diamonds and Salinas, jointly and severally, under 3 Diamonds Note No. 1, the amount of \$22,853.84;
- b. From and against 3 Diamonds and Salinas, jointly and severally, under 3 Diamonds Note No. 2, the amount of \$46,986.78;
- c. From and against 3 Diamonds and Salinas, jointly and severally, under 3 Diamonds Note No. 3, the amount of \$438,819.04;
- d. From and against 3 Diamonds and Salinas, jointly and severally, under 3 Diamonds Note No. 4, the amount of \$319,814.50;
- e. From and against 3 Diamonds and Salinas, jointly and severally, under 3 Diamonds Note No. 5, the amount of \$25,334.66;
- f. From and against 3 Diamonds and Salinas, jointly and severally, under 3 Diamonds Note No. 6, the amount of \$25,151.85;
- g. From and against 3 Diamonds and Salinas, jointly and severally, under 3 Diamonds Note No. 7, the amount of \$32,903.53;
- h. From and against El Toro and Salinas, jointly and severally, under El Toro Note No. 1, the amount of \$22,995.53;
- i. From and against El Toro and Salinas, jointly and severally, under El Toro Note No. 2, the amount of \$300,527.77;
- j. From and against El Toro and Salinas, jointly and severally, under El Toro Note No. 3, the amount of \$1,367,028.25;
- k. From and against Saltillo Group and Salinas, jointly and severally, under Saltillo Note No. 1, the amount of \$81,355.76;

- l. From and against Saltillo Group and Salinas, jointly and severally, under Saltillo Note No. 2, the amount of \$28,707.87;
- m. From and against Saltillo Group and Salinas, jointly and severally, under Saltillo Note No. 3 the amount of \$485,808.62;
- n. From and against S & F and Salinas, jointly and severally, under the S & F Note, the amount of \$519,725.52;
- o. From and against Salinas under the Salinas Note, the amount of \$235,656.60;
- p. From and against Respondents, post-judgment interest on the foregoing sums at the contractual default rate of 17.75% per annum;
- q. From and against Respondents, jointly and severally, PlainsCapital Bank's attorneys' fees and expenses incurred in the collection of the Notes and Guaranty Agreements and for prosecution of an award in this Arbitration in the amount of \$125,000.00; and
- r. From and against Respondents, jointly and severally, post-judgment interest on the award to PlainsCapital for its costs, attorneys' fees, expenses and arbitration fees at 5% per annum, the highest lawful rate.

The administrative fees and expenses of the American Arbitration Association totaling \$14,700.00, and the compensation and expenses of the Arbitrators totaling \$45,438.98 shall be borne by Respondents, jointly and severally. Therefore, Respondents, jointly and severally, shall reimburse Claimant the sum of \$60,138.98 representing that portion of said fees and expenses in excess of the apportioned costs previously incurred by Claimant.

This Award is in full and final settlement of all liability and damages claims and all defenses submitted to this Arbitration. All claims, and pending motions of any kind not expressly granted herein are denied. This Award is final and confirmable.

This Award may be executed in any number of counterparts, each of which shall be deemed an original, and all of which shall constitute together one and the same instrument.

Dated this 15th day of April 2019.

Catherine Stone  
Hon. Catherine Stone, Chair

Lisa A. Powell  
Lisa Powell, Arbitrator

Tom Collins  
Tom Collins, Arbitrator

## CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

<p><b>I. (a) PLAINTIFFS</b></p> <p>PlainsCapital Bank</p> <p>(b) County of Residence of First Listed Plaintiff <u>Dallas</u> (EXCEPT IN U.S. PLAINTIFF CASES)</p> <p>(c) Attorneys (Firm Name, Address, and Telephone Number) Diann M. Bartek - Attorney-in-Charge and Jeana Long, Dykema Gossett PLLC, 1400 N. McColl Road, Suite 204, McAllen, Texas 78501, 956-984-7400</p>		<p><b>DEFENDANTS</b> 3 Diamonds, Inc., El Toro Builders, Inc., Saltillo Group, L.L.C., S &amp; F Developers &amp; Builders, LLC, and Norberto Salinas</p> <p>County of Residence of First Listed Defendant <u>Hidalgo</u> (IN U.S. PLAINTIFF CASES ONLY)</p> <p>NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.</p> <p>Attorneys (If Known) Reynaldo Ortiz, Law Office of Reynaldo Ortiz, LP, 1305 East Nolana Loop, Suite F, McAllen, Texas 78504, 956-687-4567; Mark A. Weitz, Weitz Morgan PLLC, 100 Congress Avenue, Suite 2000, Austin, TX 78701, 512-657-1849</p>																													
<p><b>II. BASIS OF JURISDICTION</b> (Place an "X" in One Box Only)</p> <table style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 50%; vertical-align: top;"> <input type="checkbox"/> 1 U.S. Government Plaintiff         </td> <td style="width: 50%; vertical-align: top;"> <input checked="" type="checkbox"/> 3 Federal Question (U.S. Government Not a Party)         </td> </tr> <tr> <td style="width: 50%; vertical-align: top;"> <input type="checkbox"/> 2 U.S. Government Defendant         </td> <td style="width: 50%; vertical-align: top;"> <input type="checkbox"/> 4 Diversity (Indicate Citizenship of Parties in Item III)         </td> </tr> </table>		<input type="checkbox"/> 1 U.S. Government Plaintiff	<input checked="" type="checkbox"/> 3 Federal Question (U.S. Government Not a Party)	<input type="checkbox"/> 2 U.S. Government Defendant	<input type="checkbox"/> 4 Diversity (Indicate Citizenship of Parties in Item III)	<p><b>III. CITIZENSHIP OF PRINCIPAL PARTIES</b> (Place an "X" in One Box for Plaintiff and One Box for Defendant)</p> <table style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 50%; vertical-align: top;"> <table style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 50%; vertical-align: top;"> <input type="checkbox"/> PTF Citizen of This State         </td> <td style="width: 50%; vertical-align: top;"> <input type="checkbox"/> DEF Incorporated or Principal Place of Business In This State         </td> </tr> <tr> <td style="width: 50%; vertical-align: top;"> <input type="checkbox"/> PTF Citizen of Another State         </td> <td style="width: 50%; vertical-align: top;"> <input type="checkbox"/> DEF Incorporated and Principal Place of Business In Another State         </td> </tr> <tr> <td style="width: 50%; vertical-align: top;"> <input type="checkbox"/> PTF Citizen or Subject of a Foreign Country         </td> <td style="width: 50%; vertical-align: top;"> <input type="checkbox"/> DEF Foreign Nation         </td> </tr> </table> </td> </tr> </table>		<table style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 50%; vertical-align: top;"> <input type="checkbox"/> PTF Citizen of This State         </td> <td style="width: 50%; vertical-align: top;"> <input type="checkbox"/> DEF Incorporated or Principal Place of Business In This State         </td> </tr> <tr> <td style="width: 50%; vertical-align: top;"> <input type="checkbox"/> PTF Citizen of Another State         </td> <td style="width: 50%; vertical-align: top;"> <input type="checkbox"/> DEF Incorporated and Principal Place of Business In Another State         </td> </tr> <tr> <td style="width: 50%; vertical-align: top;"> <input type="checkbox"/> PTF Citizen or Subject of a Foreign Country         </td> <td style="width: 50%; vertical-align: top;"> <input type="checkbox"/> DEF Foreign Nation         </td> </tr> </table>	<input type="checkbox"/> PTF Citizen of This State	<input type="checkbox"/> DEF Incorporated or Principal Place of Business In This State	<input type="checkbox"/> PTF Citizen of Another State	<input type="checkbox"/> DEF Incorporated and Principal Place of Business In Another State	<input type="checkbox"/> PTF Citizen or Subject of a Foreign Country	<input type="checkbox"/> DEF Foreign Nation																	
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